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In The Supreme Court of

THE UNITED STATES,

OCTOBER TERM, 1897.

IN ERROR TO THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND
FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

PHELP & PHELPS,
ATTORNEYS FOR DEFENDANT IN ERROR,
Grafton, North Dakota.

The Supreme Court of
the United States
OCTOBER TERM 1897.

INDEX.

	PAGE
Notice of Motion to Dismiss Writ of Error..	1
Motion to Dismiss.....	4
Complaint of Plaintiff Below.....	5
Answer of Defendant Below.....	10
Trial Proceedings.....	18
Opinion of Supreme Court of N. Dak.....	23
Petition for Writ of Error.....	24
Assignments of Error.....	24
Writ of Error.....	33



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OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND
FORKS, NORTH DAKOTA,
Plaintiff in Error.

vs.

ALEXANDER ANDERSON,
Defendant in Error.

NOTICE OF MOTION TO DISMISS WRIT
OF ERROR.

To Messrs. W. E. Dodge and Burke Corbet,
Attorneys for Plaintiff in Error:—

Please take notice, that upon the entire
record in the above entitled action and more
particularly upon the writ of error, the petition
and assignment of errors for the same, the plead-
ings in the Court below and the opinion of the
Supreme Court of the State of North Dakota in
the action hereinafter mentioned, handed down

- 5 on the 4th day of October, A. D., 1897,—at the court room of the Supreme Court of the United States, in the City of Washington, D. C., on the 10th day of January, A. D., 1898, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the undersigned, on behalf of the above named defendant in error, will move the Court to dismiss the writ of error issued in the above entitled action on the 6th day of November, A. D., 1897, and to affirm the judgment of the Supreme Court of the State of North Dakota, mentioned in said writ of error and to affirm the judgment of the District Court in and for the County of Grand Forks and State of North Dakota, together with costs of this motion and damages of ten per cent upon the amount of said judgment, in the action wherein the above
- 6
- 7 named defendant in error, Alexander Anderson, was plaintiff, and the above name plaintiff in error, the First National Bank of Grand Forks, North Dakota, was defendant; the judgment of which District Court was rendered on the 3rd day of June, A. D., 1897, and the judgment of
- 8 which Supreme Court affirming the same was rendered on the 4th day of October, A. D., 1897.

Said motion will be based upon the ground that, although the record may show that this Court has jurisdiction, it is manifest that said writ of error was sued out and this appeal taken for delay only, and that the question on which the jurisdiction of this Court depends is so frivolous as not to need further argument, in that

I.

The alleged Federal question attempted to be raised by plaintiff in error, was not necessarily involved in the decision arrived at and rendered either in said Supreme Court of the State of North Dakota or in said District Court in and for the County of Grand Forks and State of North Dakota; but the said judgments were rendered and said decisions made on settled pre-existing rules of general jurisprudence. 9 10

II.

It is apparent on the face of the record that the question on which the jurisdiction, if any, of this Court depends, was manifestly decided right in the Courts below, and this case ought not to be held for further argument.

Dated at Grafton, North Dakota, this 15th day of December, A. D., 1897. 11

PHELPS & PHELPS,
Attorneys for Defendant in Error.
Grafton, N. Dak.

13

In The Supreme Court of
THE UNITED STATES,

OCTOBER TERM, 1897.

14 IN ERROR TO THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND
FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

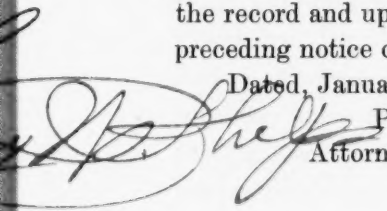
15

MOTION TO DISMISS WRIT OF ERROR.

Now comes the above-named defendant in error, Alexander Anderson, by Phelps & Phelps, his attorneys, appearing specially to object to the jurisdiction of the court, and moves the court that the writ of error issued in the above entitled action on the 6th day of November, A. D. 1897, be dismissed and the judgments below be affirmed, together with damages and costs, upon the record and upon the grounds specified in the preceding notice of motion therefor.

16

Dated, January 10th, A. D. 1898.

 PHELPS & PHELPS,
Attorneys for Defendant in Error,
Grafton, North Dakota.

COMPLAINT.

17

The following is the amended complaint of defendant in error in the court below :

STATE OF NORTH DAKOTA

County of Grand Forks.

18

IN DISTRICT COURT,

FIRST JUDICIAL DISTRICT.

ALEXANDER ANDERSON,

Plaintiff,

vs.

19

THE FIRST NATIONAL BANK OF GRAND
FORKS, NORTH DAKOTA,

Defendant.

The plaintiff complains and alleges :

I.—That at all the times hereinafter mentioned, the defendant was, and still is a National Banking corporation duly organized and existing under the general Acts of Congress of the United States relating to National Banks, and doing a general banking business at the City of Grand Forks, in the State of North Dakota.

20

21 II.—That on the First day of October, A. D.
1890, the plaintiff was the owner in fee of
those tracts or parcels of land lying and being in
the County of Grand Forks and State of North
Dakota, described as follows, to-wit: The North
East quarter of Section Five (5), and the North
West quarter of Section Nine (9), in township
One Hundred and Fifty-Four (154) North, of
Range Fifty-Three (53) West, containing Three
22 Hundred and Twenty (320) acres more or less,
according to the United States Government sur-
vey thereof, and that the value of the same then
was and now is the sum of Seven Thousand
(\$7000.-) Dollars.

III.—That on the First day of October, A. D,
1890, the plaintiff bargained, sold and conveyed
said lands by deed of warranty to one John A.
23 Willson, and delivered the said deed thereof to
said John A. Willson, and in consideration there-
of, the said John A. Willson executed and deliv-
ered to the plaintiff his seven promissory notes
for the sum of One Thousand (\$1000.-) Dollars
each, signed also by Sarah J. Willson, Annie War-
ren and Henry Warren, Sr., with interest thereon
24 at the rate of nine per cent. per annum from their
date, payable annually, each dated October 1st,
1890, and due and payable respectively December
1st, 1891; December 1st, 1892; December 1st;
1893; December 1st, 1894; December 1st, 1895;
December 1st, 1896, and December 1st, 1897; and
said John A. Willson, Sarah J. Willson, Annie
Warren and Henry Warren, Sr., also executed
and delivered to the plaintiff at the same time

their certain mortgage upon said lands, and also 25
certain other lands therein described,—in all four
hundred and eighty (480) acres, securing payment
of said promissory notes to the plaintiff, his heirs,
executors, administrators and assigns.

IV.—That on or about the sixth day of April,
A. D. 1891, the plaintiff borrowed from the de-
fendant, at Grand Forks, North Dakota, the sum
of Two Thousand (\$2000.—) Dollars, and executed 26
and delivered to the defendant his promissory
note therefor, and at the same time deposited with
the defendant, as collateral security for the pay-
ment of such sum, the seven promissory notes of
J. A. Willson and others, in favor of the plaintiff,
hereinbefore mentioned, and endorsed the same
to the defendant as such collateral security, and
further executed and delivered to the defendant 27
as part of such collateral security an assignment
of the mortgage hereinbefore mentioned, which
secured payment of said promissory notes.

V.—That on the 3rd day of October, A. D.
1891, the defendant telegraphed to the plaintiff at
Seattle, Washington, requesting plaintiff to tele-
graph the defendant his best offer for a sale of said
seven promissory notes, by the defendant, for the 28
plaintiff, to a third person who was not named in
said telegram from defendant to plaintiff, and
thereupon the plaintiff telegraphed to the defend-
ant as follows:—"To First National Bank, Grand
Forks, North Dakota,:—Will give discount of
Five Hundred Dollars. Alex. Anderson."

VI.—That the defendant duly received said

29 telegram from the plaintiff, and thereupon, the defendant, wrongfully and in violation of its duty as plaintiff's agent for the sale of said seven promissory notes, converted the said notes to its own use and sold the same to itself, and on the 7th day of October, A. D., 1891, the defendant remitted to the plaintiff the sum of four thousand three hundred and ninety seven and 48-100 (\$4397.48) dollars, part of the proceeds of said sale, and
30 mailed to the plaintiff his promissory note to the defendant for Two Thousand (\$2000.-) Dollars hereinbefore mentioned, and notified the plaintiff that defendant's commission for selling said seven promissory notes was the sum of Thirty-Five (\$35.-) Dollars; but the defendant has wholly failed to pay or remit, or cause to be paid or re-
mitted to the plaintiff the balance due him on
31 said sale or any part thereof, and the defendant is now indebted to the plaintiff, as and for said balance due him, in the sum of Twelve Hundred and Thirty-two and 52-100 (\$1232.52) Dollars, with interest thereon at the rate of seven per cent per annum, from and after the 7th day of October,
32 A. D. 1891.

VII.—That at the time of the sale and conversion of said seven promissory notes, as aforesaid, the same were of the value of Seven Thousand and Six Hundred and Thirty (\$7630.-) Dollars, lawful money of the United States, and that the same had not been paid to the plaintiff, nor any part thereof.

VIII.—That on receiving from the defendant

said remittance of four thousand three hundred and ninety-seven and 48-100 (\$4397.48) dollars and said note for two thousand (\$2000.00) dollars, the plaintiff forthwith mailed and deposited in the post office at the City of Seattle, in the State of Washington, directed to the defendant, at Grand Forks, North Dakota, a written notice that he would not accept said remittance and note as full payment of the proceeds of said sale; but that he would insist that defendant account to plaintiff for, and remit to him the balance due him upon the full amount owing to plaintiff on said notes at the time of said sale, to wit:—the sum of Seven Thousand Six Hundred and Thirty (\$7630.) Dollars, less the Five Hundred (\$500.—) Dollars discount which had been agreed to by plaintiff, as aforesaid; but at the time of writing, mailing and depositing said notice, as aforesaid, the plaintiff relying on the defendant's telegrams and letters aforesaid, and being induced and misled thereby, believed the sale aforesaid had been made by the defendant, as plaintiff's agent, to some third person.

The plaintiff herein now elects to waive the wrongful element in the sale by defendant to itself hereinbefore mentioned, for the purpose of maintaining this action as a suit in assumpsit, to recover from the defendant the value of the said promissory notes as aforesaid at the time of the conversion hereinbefore alleged, less the remittance already made, as aforesaid, with interest from the the date of said conversion upon the balance, at

37 the rate of seven per cent. per annum,—pursuant
to the opinion of the Supreme Court of the State
of North Dakota rendered on the second appeal
of this action, to said Court.

IX.—That prior to the commencement of
this action, the plaintiff demanded and caused to be
demanded from the defendant, payment of the
balance of the proceeds of the sale of said seven
38 promissory notes aforesaid, but that the defendant
has refused and neglected, and still refuses and
neglects, to pay the same or any part thereof to
the plaintiff.

Wherefore, plaintiff demands judgment
against the defendant for the sum of Twelve
Hundred and Thirty-two and 52-100 (\$1232.52)
Dollars, with interest thereon at the rate of seven
39 per cent. per annum from and after the seventh
day of October, A. D., 1891, together with the
costs and disbursements of this action, and for
such other and further relief as may be just.

Dated, March 25th, A. D., 1893.

PHELPS & PHELPS,

Plaintiff's Attorneys,

40

Grafton, N. D.

ANSWER.

Which complaint defendant answered, setting
up the following defense:

I.

Denies each and every allegation therein con-
tained, except as hereinafter specifically admitted.

II.

41

Admits paragraph one (I) of said complaint but denies that said banking business included any agency for the sale of notes, mortgages or securities for other persons.

III.

Admits that October 1st, 1890, the record title to a part only of the North East quarter 42 (N. E. $\frac{1}{4}$) of section five (5), township one hundred fifty-four (154), range fifty-three (53) and part only of the North West quarter (N. W. $\frac{1}{4}$) of section nine (9), township one hundred fifty-four (154), range fifty-three (53), was in plaintiff, and was by him conveyed to said Wilson, and denies that said lands were then or have since been worth to exceed Forty-six hundred ninety-five 43 and 60-100 (\$4695 60) Dollars. Admits the execution of the notes and mortgage on said lands and on the North East quarter (N. E. $\frac{1}{4}$) of section four (4), Township one hundred fifty-four (154) Range fifty-three (53), and alleges that said last named land was not then and has not since been worth to exceed thirteen hundred (\$1300.00) Dollars, over and above the incumbrances thereon 44 and denied each and every other allegation in paragraph two (II) and three (III) of said amended complaint.

IV.

Admits paragraph four (IV) of said amended complaint.

V.

45

Admits that plaintiff telegraphed defendant "Will give discount of hundred dollars" and denies each and every other allegation of paragraph (V) of said amended complaint, and especially denies that defendant ever telegraphed the request referred to in said paragraph, or ever made such request to plaintiff.

VI.

46

Admits that defendant received said telegram from plaintiff, and that defendant wrote plaintiff as follows:

"GRAND FORKS, N. D., October 7th, 1891.

MR. ALEX. ANDERSON,

Seattle, Washington.

47 DEAR SIR.—

Your wire October 5th to hand.

Discount	\$ 500 00
Half per cent. <i>commission for selling</i> the paper.....	35 00
Release and record of \$80. mortgage given Gates.....	2 00
48 Record assignment.....	1 50
1890 taxes you stipulated to pay.....	47 02
Attorney for examination abstract....	5 00
Continuing abstract.....	4 50
Your note.....	2000 00
Exchange on New York.....	7 50
Dft. for balance.....	4397 48
	<hr/>
	\$7000 00

Returns for J. A. Willson 7 notes. In my 49
judgment, this is a good trade for you.

Yours,

S. S. TITUS, Cr."

and mailed therewith to plaintiff his \$2000.00
note and defendant's draft for \$4397.48, and
denies each and every other allegation of para-
graph six (VI) of said amended complaint; and
defendant especially denies that it was ever the
agent of plaintiff for the sale of said notes, or for 50
any other purpose whatever, or ever acted or
undertook to act as such agent, or ever sold such
notes or any thereof to itself, or ever wrongfully
converted said notes or any thereof, or ever vio-
lated any duty or obligation to plaintiff, or that it
is now or ever has been indebted to plaintiff in
the sum of twelve hundred thirty-two and 52-100
(\$1232.52) Dollars, or any other sum or amount 51
whatever.

VII.

Denies each and every allegation of paragraph
seven (VII) of said amended complaint and denies
that there ever was a sale and conversion of said
notes, or any thereof, as referred to, and denies
that on October 7th, 1891, or at any time prior 52
thereto said notes were worth seven thousand six
hundred and thirty (\$7630.00) dollars, or any
other sum or amount in excess of Six thousand
(\$6,000) dollars.

VIII.

Admits that about October 13th, 1891 plaintiff
wrote defendant as follows:

53 "SEATTLE, WASHINGTON, October 13th, 1891.
FIRST NATIONAL BANK,
Grand Forks, N. D.

GENTLEMEN:—

Your letter, with enclosed draft for \$4,397.48 and note of \$2,000.00, is at hand, which I cannot accept. I wired you I would give a discount of Five Hundred Dollars, and you make a discount
54 of about \$1,175. I did not agree to pay any other expenses. These notes call for \$7,000.00, and \$630, interest. I shall expect balance of money by return mail.

Yours respectfully,

ALEX. ANDERSON."

and denies each and every other allegation of paragraph (VIII) and nine (IX) of said amended
55 complaint, and especially denies that plaintiff was ever misled in any manner by defendant's telegrams and letters, or any thereof, or ever believed or acted on any belief that any sale had been made by defendant as plaintiff's agent to a third person, or ever recognized defendant as his agent for the sale of said notes, or for any other purpose
56 or ever recognized any such sale, or ever considered or supposed that he was dealing with any person but defendant, or ever claimed, demanded or in any way referred to or considered the proceeds of any sale or supposed sale by defendant as a basis for his claim against defendant, and alleges that plaintiff claimed the balance above referred to upon the basis and claim of a sale of said notes by plaintiff to defendant as principals.

IX.

57

Defendant alleges the truth and facts in relation to said transaction to be as follows and not otherwise.

From April 6th, 1891 to October 5th, 1891, defendant held said seven notes as collateral to plaintiff's note of Two thousand (\$2000.00) dollars; during and prior to said period by and in certain conversations, letters and telegrams, plaintiff offered to sell said notes to defendant at certain discounts from face, and defendant offered to purchase them from plaintiff at other and greater discounts.

58

X.

The defendant expected to rediscount said notes in case it purchased them from plaintiff, and did not desire to purchase unless it had reasonable assurance of being able to rediscount them on terms profitable to itself. Its offers to purchase from plaintiff were made only when it had such assurance, and defendant in its letters and telegrams referred to third parties to whom it expected to sell or rediscount said notes in case it purchased from plaintiff, as a reason why a prompt answer was desired. That plaintiff was interested in such prospective rediscount or sale by defendant to a third party, for the reason that the prospect or assurance of such sale constituted an inducement to defendant to purchase from plaintiff, but for no other reason; such rediscount or sale by defendant in case any should be made, would in itself be a transaction wholly between defendant and a third person, and to which plaintiff

59

60

61 would be in no sense a party, and in which, or in the terms, conditions or proceeds of which plaintiff would have no claim, right or interest whatever, and from said conversations, letters and telegrams the foregoing facts became, and were fully known by and between the parties to this action.

XI.

62 That throughout said transaction defendant, by its officers, understood all negotiations to be for an absolute sale of said notes by plaintiff to defendant, and understood and believed, and still believes, and was, and is justified in believing that plaintiff so understood said negotiations. That all communications from defendant to plaintiff in relation thereto were with that intent and purpose, and defendant
63 intended they should be, and believed and still believes they were so understood by plaintiff, and that all said communications considered together disclose said intent. That all communications from plaintiff to defendant were understood and believed by defendant to be so intended by plaintiff, and defendant was, and is justified in so
64 believing, and said communications considered together show such intent.

XII.

That upon the receipt of plaintiff's telegram, and from the terms thereof, together with the proceedings, negotiations and communications in relation thereto, and the condition of the title to

said lands, and certain agreements made by plaintiff in regard to taxes, and the reasonable commission and expense of clearing the title, defendant believed and was justified in believing that plaintiff intended said telegram as an offer to sell said notes to the defendant for sixty-five hundred (\$6500.00) dollars less plaintiff's note of two thousand (\$2000.00) dollars, and less the aforesaid taxes and expenses of clearing the title to said lands, amounting to about one hundred two and 52-100 (\$102.52) dollars.

XIII.

Acting upon said belief, defendant accepted said offer, or supposed offer, and wrote the aforesaid letter of October 7th, 1891, with the enclosures of note and draft aforesaid, and defendant alleges that thereby was completed a contract by and between the parties hereto, whereby plaintiff sold to defendant all of said notes, and that plaintiff received payment in full therefor.

XIV.

That if there was any mistake of fact in regard to the terms of said offer, it was only as to the amount for which plaintiff intended to offer the notes for sale, and the payment of said one hundred and two and 52-100 (\$102.52) dollars, and was not as to any question of agency; neither plaintiff nor defendant had then thought of or referred to any agency, and if there was any mistake of fact, the same was made through the fault of plaintiff, and plaintiff did not seek to avoid said

69 contract or rescind the same on account of any such mistake.

Wherefore, defendant demands judgment against plaintiff for its costs and disbursements in this action.

Dated, Grand Forks, North Dakota, October 23rd, 1895.

BURKE CORBET,

Attorney for Defendant.

70

TRIAL.

This cause came on regularly for trial on February 2nd and 3rd, 1897, in the district court in and for Grand Forks county, N. D., plaintiff
71 below appearing by Phelps & Phelps, his attorneys, and defendant appearing by Burke Corbet, its attorney. (Three previous trials had been had, and three previous appeals taken by plaintiff, resulting in reversals and judgment directing this fourth trial.)

72 As far as is material for the purposes of this motion, we present the following parts of the record of trial proceedings:

Plaintiff testified:

“On the Third day of October, 1891, I was owner of the said seven promissory notes, and on the said date, I received a message purporting to have been sent to me by the defendant, relating to said notes.

This message read as follows :

73

"OCTOBER 3rd, 1891.

ALEXANDER ANDERSON,

Seattle, Washington.

Did you receive our letter September Fourteenth? Wire us your best offer so we can advise a party who said he would hold his money till we heard from you.

74

FIRST NATIONAL BANK."

On October 5th, 1891, I replied to this message by sending to the defendant the following telegram :

"SEATTLE, Washington, October 5th, 1891.

FIRST NATIONAL BANK,

Grand Forks, North Dakota.

75

Will give discount of Five Hundred Dollars.

ALEX ANDERSON."

I received a reply to this telegram by letter from the defendant enclosing a New York draft for Four Thousand Three Hundred and Ninety-seven Dollars and Forty-eight cents, payable to myself; also my note to the defendant for Two Thousand Dollars, due December 14th, 1891, with interest paid to its maturity, duly canceled. This is the same note mentioned in paragraph Four of the complaint in this action.

76

The letter last referred to reads as follows, written by S. S. Titus, defendant's cashier:

77 "GRAND FORKS, N. D. October 7th, 1891.
MR. ALEX. ANDERSON,
Seattle, Washington.

DEAR SIR.—

Your wire October 5th to hand.

Discount	\$ 500 00
Half per cent. <i>commission for selling the</i> <i>paper</i>	35 00
78 Release and record of \$80. mortgage given Gates.....	2 00
Record assignment.....	1 50
1890 taxes you stipulated to pay.....	47 02
Attorney for examination abstract.....	5 00
Continuing abstract.....	4 50
Your note.....	2000 00
Exchange on New York.....	7 50
79 Dft. for balance.....	4397 48
	<hr/>
	\$7000 00

Returns for J. A. Willson 7 notes. In my judgment, this is a good trade for you.

Yours,

S. S. TITUS, Cr."

80 I replied to this letter on October 13th, 1891, by letter, which I sent to the defendant, reading as follows:

SEATTLE, Washington, October 13th, 1891.
FIRST NATIONAL BANK,
Grand Forks, N. Dak.

GENTLEMEN:—Your letter with enclosed draft for \$4,397.48, and note of \$2,000, is at hand, which I cannot accept. I wired you I would give

a discount of Five Hundred Dollars, and you 81
made a discount of about \$1,175. I did not
agree to pay any other expenses. Those notes
call for \$7,000, and \$630 interest. I shall expect
balance of money by return mail.

Yours Respectfully,

ALEX. ANDERSON."

I have never received any further payment
or remittance of any nature from the defendant, 82
for the proceeds of the sale of those seven Will-
son notes mentioned in the complaint.

No portion of said notes has ever been paid
to me by the signers of the same, nor in any other
manner than by the remittance of the defendant
which I have mentioned.

I have the letter of September 14th, which
is mentioned in the first telegram I have referred 83
to. It is written by S. S. Titus, defendant's
cashier and reads as follows:

GRAND FORKS, N. D., Sept. 14th, 1891.

MR. ALEX. ANDERSON,

Seattle, Washington.

DEAR SIR:—We never make a trade in the
way you mention, that is, pay a part, and later on
send or pay more. We, if we make a trade with 84
anyone, always close it up at once; then it is
complete and out of the way. If I had a basis to
work on I might find some one who would take
the paper. You offer it at \$350 discount. We
offered you a trade at \$1,000 discount. Now, if
you will make it \$700 or \$800 and *allow us a small*
commission, I will try and *place the paper for you.*

85 You, as I wrote you to make the title clear and straight, if anything should come up in the deal. The paper could be sold easier if it all run not to exceed five years. Capitalists kick on anything over five years. Money is close, and is going to continue. Wheat is going down every day. Looks as though 65 to 70 cents will be the average price farmers will receive for this crop. If
86 you care *to have us go to work* on these terms, you write or wire me.

Yours,

S. S. TITUS, Cr."

(Plaintiff's other testimony also sustained the allegations of the complaint.)

87 Defendant's cashier testified, in substance, that on October 7th, 1891, the collateral notes in suit were entered up in the "Bills Receivable" register of the defendant bank; that he did not see plaintiff personally in regard to the sale of the notes prior to that time, but had correspondence
88 with him as detailed. He admitted the sending of the letters of Sept. 14th and Oct. 7th, 1891, and receiving the telegram of Oct. 5th, 1891. He testified he had "no recollection" of sending the telegram of October 3rd, 1891, but admitted that he had made a copy of it from some place "to keep the chain of correspondence up." [On former trials, however, he admitted sending this telegram. Under Chap. 15, of the 1897 Session

Laws of N. Dak., §2, Subd. 13, our Courts take 89
judicial notice of all prior proceedings in the case
pending.]

Defendant's cashier also produced on the
trial the two last of the series of seven notes, and
testified that the others had been paid.

On February 3rd, 1897, a verdict was directed
and found in favor of plaintiff below for \$1705.85.

On June 3rd, 1897, judgment was duly en- 90
tered for \$1914.40, amount of verdict, interest
and costs.

On July 17th, 1897, defendant below appealed to
the Supreme Court of the State of North Dakota.

On October 4th, 1897, said Supreme Court
affirmed the judgment of the district court.

OPINION OF SUPREME COURT OF
NORTH DAKOTA.

91

Extracts from the opinion of the Supreme
Court of the State of North Dakota, handed
down in rendering the judgment affirming the
judgment of trial court, are cited in our brief on
this motion,—to the effect that the Court would 92
have arrived at the same conclusion at which it
did arrive, even had it conceded the contention of
plaintiff in error, [defendant below], on the Fed-
eral question sought to be raised.

Anderson vs. Bank, 72 N. W. Rep., [N.
Dak.,] 916-921.

93 IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA,

ALEXANDER ANDERSON, PLAINTIFF AND RESPONDENT,

VS.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH
DAKOTA, DEFENDANT AND APPELLANT.

PETITION FOR WRIT OF ERROR.

94 And now comes the defendant and appellant
herein, the First National Bank of Grand Forks,
North Dakota, and says: that on or about the
13th day of October, 1897, this court entered
judgment herein in favor of the plaintiff and
against the defendant, The First National
Bank aforesaid, in which judgment and the pro-
ceedings had prior thereunto in this cause cer-
tain errors were committed to the prejudice of
95 this defendant, all of which will more in detail
appear from the assignment of errors which is
filed with this petition.

WHEREFORE the defendant prays that a
writ of error may issue in this behalf to the Su-
preme Court of the United States for the correc-
tion of errors so complained of, and that a tran-
script of the record, proceedings and papers in
96 this cause duly authenticated, may be sent to
said Supreme Court of the United States, and
that a supersedeas may be allowed upon lodging
with the Clerk of this Court its bond according
to law therefor.

Dated at Grand Forks, North Dakota, Octo-
ber 16th, 1897.

W. E. DODGE and BURKE CORBET,
Attorneys for Defendant and Appellant.

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA,

97

ALEXANDER ANDERSON, PLAINTIFF AND RESPONDENT,
VS.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH
DAKOTA, DEFENDANT AND APPELLANT.

At Law.

ASSIGNMENT OF ERRORS.

The defendant in this action, the First National Bank of Grand Forks, North Dakota, in connection with its petition for a writ of error makes the following assignment of errors, which it avers occurred upon the trial and determination of the cause in this, the Supreme Court of the State of North Dakota, to-wit: 98

I.

The court erred in denying the defendant's assignments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the admission of plaintiff's evidence, and wherein this court erroneously ruled and adjudged that the district court did not err in the admission of such evidence in the following instances, to-wit: 99

(1) In assignment of error Number One (1) that the district court erred in overruling and denying defendant's objection made at the first offer of evidence in behalf of the plaintiff, wherein defendant objected to the introduction of any evidence on behalf of the plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action, which objection was overruled by the district court, and exceptions to such rulings were duly taken, allowed and preserved, and which ruling is affirmed by 100

101 this, the Supreme Court of North Dakota. The
complaint stating a pretended cause of action
which on the face thereof was based upon a pre-
tended contract on the part of the defendant bank,
which by the statutes of the United States was
not within the power of a national bank to make,
and upon the face thereof was ultra vires and
void.

102 (2) In assignment of error Number (50), that
the district court erred in overruling and denying
defendant's objection to Exhibit "E," the letter
dated Grand Forks, September 14th, 1891, ad-
dressed to Mr. Alexander Anderson, Seattle,
Wash., and signed S. S. Titus, Cr., wherein is
contained the pretended offer to act as agent in
103 the following words: "If I had basis to work on
I might find someone who would take the paper.
You offered it at \$350.00 discount, we offered you a
trade at \$1000.00 discount. Now if you
will make it \$700.00 or \$800.00 and allow
us a small commission, I will try and place the
paper for you." Which ruling by the district
104 court was affirmed by this, the Supreme Court of
North Dakota, although the contract sought to
be established thereby was one which under the
National Bank Act, a statute of the United States
was not within the powers of a national bank to
make, or to perform, and was ultra vires and void,
and under such statute it was not within the pow-
ers of a cashier of a national bank to bind his bank
by contract to assume the duties and obligations

of an agent for the sale of notes and mortgages to third persons, and the act of the cashier in writing such letter was ultra vires and void. 105

(3) In assignment of errors Number Seventy-Four (74) concerning like objections to the introduction in evidence of the same letter as exhibit Eleven (11) upon identification thereof by the witness, S. S. Titus.

(4) In assignment of error Number Ninety (90) wherein the district court erred in overruling and denying defendant's motion to strike out the letter of September 14th, 1891, being exhibit "E" and also identified as exhibit "11" as above stated, on the ground that it was ultra vires and also not shown to have been the act of the defendant bank, which erroneous ruling was affirmed by this, the Supreme Court of North Dakota, although the contract of agency held by this court to be established thereby was as the contract of a National Bank ultra vires under the National Bank Act, and the act of the cashier in undertaking to bind his bank by such contract was ultra vires under said act. 106 107

(5) In assignment of errors Number One Hundred and Forty-Seven (147) concerning the admission of said letter, Exhibit "E" admitted over defendant's objections and the admission adjudged to be proper by this Court. 108

(7) In assignment of errors Number One Hundred and Forty-Five (145) wherein defendant assigned error in admitting evidence of the pretended telegram of October 3rd, 1891, as fol-

109 lows: "Did you receive our letter Sept. 14.
Wire us your best offer so we can advise a party
who said he would hold his money until we heard
from you. First National Bank." Upon the
ground that there was no evidence of the identity
or authority of the writer or sender, if any, and
the agency if established was ultra vires, and the
act of any officer contracting that the bank would
110 act as agent would be ultra vires, which express
claim for immunity against liability both on ac-
count of ultra vires acts of the cashier, and also
on account of ultra vires contracts by the bank
itself was by this Supreme Court of North Dako-
ta erroneously denied.

II.

The court erred in denying defendant's as-
111 signments of errors committed by the district
court of North Dakota upon the trial of said cause
in said district court in the rejection of evidence
offered by the defendant which erroneous rulings
were affirmed and sustained by this, the Supreme
Court of North Dakota, which court erroneously
denied defendant a reversal of the judgment of
112 said district court, and erroneously affirmed said
judgment against defendant in said action, not-
withstanding such errors by the court below, and
that the said erroneous rejection of evidence
was in the following instances, to-wit:

(1) In assignment of error Number One
Hundred and Twenty-three (123) wherein J. Walk-
er Smith, President of the Board of Directors
of the defendant bank, was produced, sworn and

examined as a witness on behalf of the defendant 113
and shown competent to testify to the facts, and
was asked on behalf of the defendant: "Did the
board of directors of the defendant bank in any
way ever authorize Mr. Titus to act for and on
behalf of the bank constituting the bank thereby
the agent of the the plaintiff for the sale of
the notes in litigation?" Which question was
objected to by the plaintiff on the ground that 114
it was incompetent, irrelevant and immaterial,
which objection was erroneously sustained by the
district court, and exceptions to such ruling were
duly taken, allowed and preserved, and duly sub-
mitted to this, the Supreme Court of the State
of North Dakota, wherein such ruling was er-
roneously affirmed and judgment rendered against
defendant, notwithstanding such error, though 115
under the statutes of the United States, the
cashier, Titus, could not render defendant liable
as agent by his acts without such express author-
ity, and any act on the part of such cashier at-
tempting to contract for or on behalf of the bank
that it would assume or undertake any of the
duties, obligations or liabilities of plaintiff's agent
for the sale of said notes to third parties, if es-
tablished, was ultra vires and void. 116

(2) In assignment of errors Number One
Hundred and Twenty-four (124) wherein defend-
ant offered to prove by said witness, J. Walker
Smith, that the defendant bank did not in any
way either by its board of directors or otherwise,
ever authorize S. S. Titus, its cashier, to act for
and on behalf of the defendant bank, constitut-

- 117 ing the bank the agent of plaintiff for the sale of
the seven promissory notes in litigation, which
evidence the district court erroneously excluded
upon plaintiff's objection that it was irrelevant,
incompetent and immaterial, to which ruling ex-
ceptions were duly taken, allowed and preserved,
and duly submitted to this, the Supreme Court
of North Dakota, wherein said ruling was er-
roneously affirmed, and judgment has been er-
roneously rendered and entered against defend-
118 ant notwithstanding such error, although it mani-
festly appeared that such ruling was in conflict
with the statutes of the United States, and de-
nied to defendant a right, privilege and immunity
claimed by defendant under such statutes that it
should not be liable for ultra vires acts of its
cashier.
- 119 (3) In assignment of errors Number One
Hundred and Twenty-five (125) wherein defend-
ant offered to prove by said witness, J. Walker
Smith, that the board of directors of the defend-
ant bank never took any action constituting the
bank or its cashier, S. S. Titus, on behalf of the
120 bank, the agent of the plaintiff for the sale of the
seven promissory notes, which evidence was
erroneously excluded by the district court upon
the same objections and such ruling duly pre-
sented to this, the Supreme Court of North Da-
kota, was erroneously affirmed and judgment
erroneously entered, though such ruling errone-
ously denied a right privilege and immunity ex-

pressly claimed by the defendant under the National Bank Act, a statute of the United States. 121

(4) In assignment of error Number One Hundred and Fifty-Four (154) wherein defendant assigned as error that the district court erred in excluding the testimony of J. Walker Smith that no authority was conferred upon any officer to, nor was any steps taken whereby the defendant bank could engage to act as agent for the sale of these notes, or otherwise, because any contract to that effect is ultra vires, and not within the implied or customary powers of officers of a national bank, which claim from immunity from ultra vires acts of its officers, and from liability on account of ultra vires contracts by national banks themselves thus expressly set up was erroneously denied by this Supreme Court of North Dakota. 122 123

III.

The Supreme Court of the State of North Dakota erred in denying to defendant the immunity conferred upon defendant as a national bank by the statutes of the United States that it should not be liable on account of ultra vires acts of its cashier, and not even by ultra vires contracts by the bank itself, which immunity was expressly claimed by defendant in the district court wherein the case was tried, and in this, the Supreme Court of said State when brought here upon appeal, and in the following instances, to-wit: 124

(1) In assignment of errors Number One Hundred and Fifty-Six (156) wherein defendant assigned as error that the district court erred

125 in directing a verdict for plaintiff for the amount directed, or for any amount, which ruling was affirmed by this, the Supreme Court of North Dakota, although the verdict was based upon a complaint which set up a cause of action solely upon an ultra vires contract, and was supported if at all, only by evidence of such ultra vires contract, made by defendant's cashier without authority.

126 [2] In assignment of errors Numbered Third [III] of the assignments of errors annexed to and written out at length at the close of defendant's brief, wherein defendant assigned error as follows: "Appellant" [this defendant] "further says there was manifest error" [by the district court] "in rendering judgment against appellant in this action for each of the following reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the
127 United States to national banks against liability on account of ultra vires acts of their officers and ultra vires contracts of the banks themselves." Which erroneous judgment was erroneously affirmed by this, the Supreme Court of North Dakota, notwithstanding such claim and right to immunity under the statutes of the United States.

IV.

128 The Supreme Court of North Dakota manifestly erred in denying to defendant, by giving judgment against it, the immunity claimed and set up by the defendant under the statutes of the United States against liability on account of ultra vires acts of its cashier, and ultra vires contracts by the bank itself, whereon alone judgment was demanded and rendered.

V.

The Supreme Court of North Dakota erred in denying defendant's petition for a rehearing

upon the ground that such court had overlooked 129
and disregarded the record and the law applica-
ble thereto in relation to the want of power or
authority of the cashier of a national bank to
bind his bank by contract to assume the duties
and responsibilities as an agent for plaintiff to sell
the notes and mortgage for plaintiff to a third
person. Also that this court overlooked and dis-
regarded the record and the law applicable there- 130
to in relation to the power of a national bank it-
self in any manner by contract to assume the du-
ties and responsibilities of such agent, and has
thereby denied defendant a right, privilege and
immunity claimed by it under the statutes of the
United States.

Dated, Grand Forks, North Dakota, October
18th, 1897.

W. E. DODGE and BURKE CORBET, 131
Attorneys for Defendant,
First National Bank of Grand Forks,
North Dakota.

WRIT OF ERROR.

United States of America, ss.

The President of the United States of
America.

To the Honorable Judges of the Supreme 132
Court of the State of North Dakota,

GREETING; Because in the records and
proceedings, as also in the rendition of the judg-
ment on a plea which is in the said Supreme
Court of the State of North Dakota before you,
or some of you, being the highest court of law or
equity of the said State of North Dakota in

- 133 which a decision could be had in said suit between Alexander Anderson and First National Bank of Grand Forks, North Dakota, wherein was drawn in question the validity of a treaty or statute or of an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of, or an authority exercised under, 134 said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially 135 set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said First National Bank of Grand Forks, North Dakota, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice 136 done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, by the 5th day of January, A. D., 1898, in the said Supreme Court, to be then and there held,

that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done. 137

WITNESS THE HONORABLE MELVILLE W. FULLER,
Chief Justice of the said Supreme
Court, the Sixth day of November, in
the year of our Lord One Thousand
Eight Hundred and Ninety-Seven. 138

J. A. Montgomery,
Clerk of the Circuit Court
(Seal of the) of the United States, for
(Circuit Court.) the District of North
Dakota.

Attested by Guy C. H. Corliss,
Chief Justice of the Supreme
Court of the State of
North Dakota. 139